Hello Holidays Sdn Bhd v Phang Lai Sim and other applications

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NOS 25–151–11 OF 2012 & 25–140–11 OF 2012
VERNON ONG J
16 OCTOBER 2013

Civil Procedure — Judicial review — High Court — Application for judicial review of decision of Consumer Claims Tribunal ('Tribunal') — Dissatisfaction over tour package by travelling agency upon return from holiday — Claim for refund at Tribunal — Tribunal awarded RM5,805 — Whether there was illegality and irrationality — Whether provision deals with services rendered or carried out — Whether relevant to tour package rendered — Consumer Protection Act 1990 s 53

The respondent had booked a tour package for 16 people to Switzerland and Italy for 13 days with the applicant, a travelling agency. The agreed price was RM14,900 per adult and RM13,000 per child and the applicant had received the payment in full. Upon returning from the tour, the respondent was dissatisfied with the applicant's package and filed a claim with the Consumer Claims Tribunal ('the tribunal') for the refund of RM7,000 being total for overpaid travelling costs in the sum of RM5,045; food paid by the respondent in the sum of RM720; hotel costs differences in the sum of RM990 and entrance fees to St Peter Basilica and Gondola in the sum of RM245. The Tribunal awarded the respondent RM5,805 ('the award'). In the present application for judicial review of the tribunal's decision, the applicant challenged the tribunal's award on the grounds of illegality and irrationality and argued that s 53 of the Consumer Protection Act 1990 ('CPA') deals with services rendered or carried out which were not relevant to the tour package rendered by the applicant to the respondent. This application was one of the 12 similar applications filed by the applicant and the outcome was binding on the remaining 11 cases.

Held, dismissing the application with costs:

(1) The tribunal's grounds of decision showed that the tribunal had made findings of fact based on the available evidence. There was no evidence to justify the court in reviewing the findings of fact by the tribunal. The court was not inclined to descend into the domain of an investigation into the merits or justification of the decision on the basis of facts and evidence found by the tribunal. If this court were to conduct such an investigation, it would be exercising its appellate powers and not its judicial review jurisdiction (see paras 29–30).

(2) The applicant had contracted to provide travel and tour arrangements for the respondent's tour to Switzerland and Italy. The applicant had undertaken to make all the necessary arrangements relating to transport, both air and land, accommodation, food and local tours amongst others. The obligations described were in the nature of services; which was clearly envisaged in the CPA. In the premises, the services provided by the applicant fell within the meaning and scope of s 53 of the CPA (see para 33).

(3) The contention that the tribunal had wrongly applied s 53 of the CPA was without merit and unsubstantiated. Whilst the tribunal had made reference to s 53 of the CPA, the tribunal had also made a finding of fact based on the evidence that the services provided by the applicant had fallen far short of that standard expected and that the costs charged by the applicant were too excessive (see paras 34–35).

[Bahasa Malaysia summary

Responden telah menempah pakej pelancongan untuk 16 orang ke Switzerland dan Itali untuk selama 13 hari dengan pemohon, agensi pelancongan. Harga yang dipersetujui adalah RM14,900 untuk orang dewasa dan RM13,000 untuk seorang kanak-kanak dan pemohon telah menerima bayaran penuh. Setelah pulang daripada melancong, responden tidak berpuas hati dengan pakej pemohon dan memfailkan tuntutan dengan Tribunal Tuntutan Pengguna ('tribunal') untuk bayaran balik sebanyak RM7,000 sebagai jumlah keseluruhan untuk kos perjalanan terlebih bayar dalam jumlah RM5,045; makanan dibayar oleh responden dalam jumlah RM720; perbezaan kos hotel dalam jumlah RM990 dan fi masuk ke St Peter Basilica dan Gondola dalam jumlah RM245. Tribunal mengawardkan responden RM5,805 ('award'). Di dalam permohonan ini untuk semakan kehakiman terhadap keputusan tribunal, pemohon mencabar award tribunal atas alasan menyalahi undang-undang dan tidak rasional dan berhujah bahawa s 53 Akta Perlindungan Pengguna 1990 ('APP') berurusan dengan khidmat yang diberikan atau dilaksanakan yang mana tidak relevan kepada pakej pelancongan yang diberikan oleh pemohon kepada responden. Permohonan ini adalah satu daripada 12 permohonan yang sama difailkan oleh pemohon dan keputusannya mengikat baki 11 kes tersebut.

Diputuskan, menolak permohonan dengan kos:

(1) Alasan keputusan tribunal menunjukkan bahawa tribunal telah membuatkan dapatan fakta berdasarkan keterangan yang ada. Tidak terdapat keterangan untuk menjustifikasikan mahkamah dalam menyemak dapatan fakta tribunal. Mahkamah tidak cenderung untuk turun ke dalam bahagian siasatan dalam merit atau justifikasi keputusan atas dasar fakta dan keterangan yang didapati oleh tribunal. Jika mahkamah ini melakukan siasatan sedemikian, ia akan melaksanakan

kuasa mahkamah rayuannya dan bukan bidang kuasa semakan kehakimannya (lihat perenggan 29–30).

(2) Pemohon telah berjanji untuk memperuntukkan perancangan perjalanan dan pelancongan untuk pelancongan responden ke Switzerland dan Itali. Pemohon telah berjanji untuk membuat kesemua perancangan berkaitan, antara lain, pengangkutan, kedua-dua udara dan darat, penginapan, makanan dan pelancongan tempatan. Tanggungjawab yang ditetapkan adalah dalam sifat khidmat; yang mana jelas dibayangkan di dalam APP. Berdasarkan tersebut, khidmat yang diperuntukkan oleh pemohon terangkum di dalam maksud and skop s 53 APP (lihat perenggan 33).

(3) Hujahan bahawa tribunal telah salah dalam mengguna pakai s 53 APP adalah tanpa merit dan tidak berasas. Sementara tribunal telah membuat rujukan kepada s 53 APP, tribunal juga telah membuat dapatan fakta berdasarkan keterangan bahawa khidmat yang diperuntukkan oleh pemohon telah merosot dari standard yang dijangka dan bahawa kos yang dikenakan oleh pemohon adalah terlalu berlebihan (lihat perenggan 34–35).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5119–5123.

Cases referred to

Anisminic Ltd v The Foreign Compensation Commission and Another [1969] 1 All ER 208, HL (refd)

Associated Provincial Picture Houses Limited v Wednesbury Corpn [1948] 1 KB 223, CA (refd)

B Surinder Singh Kanda v Government of Malaysia [1962] MLJ 169, PC (refd)

Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor [2009] 6 MLJ 402; [2010] 2 AMR 738, CA (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, SC (refd)

Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)

Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor [1998] 1 MLJ 305, CA (refd)

Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors [2011] 6 MLJ 507, CA (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Petroliam National Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600; [2000] 2 AMR 2265, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 1, FC (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390, HC (refd)
Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor [2009] 4 MLJ 285; [2009] 2 ILR 489, HC (refd)
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289; [1998] 3 CLJ 85, CA (refd)
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261, CA (refd)
Tenaga National Bhd v Tekali Prospecting Sdn Bhd & Anor [2002] 2 MLJ 707; [2002] 3 CLJ 624, CA (refd)

Legislation referred to

Consumer Protection Act 1999 ss 53, 116, 116(2), 117
Courts of Judicature Act 1964 s 25(2)
Federal Constitution Part II
Rules of Court 2012 O 53 r 2(2)
Specific Relief Act 1950 s 44

Bernard Liew (Melvin Selvam with him) (Jagjit Singh & Co) for the appellant.
Calvin Ng (Kin Jong & Co) for the respondent.

Vernon Ong J:

[1] On 9 July 2013 the court dismissed the applicant's application for judicial review for an order of certiorari to quash the award of the consumer claims tribunal dated 9 August 2012. This application is one of 12 similar applications filed by the applicant viz — 25–140–11 of 2012, 25–146–11 of 2012, 25–147–11 of 2012, 25–148–11 of 2012, 25–149–11 of 2012, 25–150–11 of 2012, 25–153–11 of 2012, 25–154–11 of 2012, 25–155–11 of 2012, 25–156–11 of 2012 and 25–157–11 of 2012. It was agreed by counsel for the applicant and the respondents in the remaining 11 cases that this application shall treated be a test case in which the outcome shall be binding on the other 11 cases.

BACKGROUND FACTS

[2] The applicant is a travel and tour company.

[3] The respondent booked a tour package for 16 people to Switzerland and Italy for 13 days. The agreed price was RM14,900 per adult and RM13,000 per child.

[4] The applicant has received payment in full of the tour package from the respondent.

[5] On 29 May 2012 the respondent left for the tour and returned to Malaysia on 9 June 2012.

[6] Being dissatisfied with the tour package, the respondent filed a claim with the consumer claims tribunal ('the tribunal') on 9 July 2012 for the refund of RM7,000 for overpaid travelling costs (RM5,045), food paid by respondent (RM720), hotel costs differences (RM990) and entrance fees to St Peter Basilica and Gondola (RM245).

[7] The hearing before the tribunal proceeded on 24 July 2012. At the hearing, the respondent and the applicant give evidence; the applicant's managing director Mr Tai Pok Kim gave evidence.

[8] On 9 August 2012 the tribunal awarded the respondent RM5,805 ('the award').

THE APPLICANT'S CASE

[9] The challenge to the tribunal's award is mounted on the grounds of illegality and irrationality.

[10] In support of the aforesaid grounds, learned counsel for the applicant cited the following instances:

(a) the evidence shows that the applicant had made known that the ten nights stay would be in 3 1/2 star hotels;

(b) the respondent's statement of claim did not raise the issue of religious sensitivities relating to the consumption of beef by the respondents;

(c) the respondents did not informed the applicant of their special needs relating to food and there was no evidence to that effect;

(d) the respondent had a choice of food;

(e) the tribunal erred when it compared the applicant's tour package to Europe during the Hari Raya period and the packages offered by another company called World Travellers;

(f) the tribunal failed to take into account that the Hari Raya Promotion Package was for a different period of time and would have consisted of different venues;

(g) the tribunal erred in that for the specific peak travel period from 29 May 2012 to 9 June 2012 to Switzerland and Italy, the package price for the tour was RM14,900 for an adult and RM13,000 for a child;

(h) the respondent had the choice to refuse the tour package price as quoted by the applicant but the respondent chose to contract with the applicant;

(i) the applicant performed and delivered on where the applicant had contracted with the respondent for the agreed price;

(j) the tribunal erred in holding that the applicant's tour package should have offered something better than the World Travellers Tour Package;

(k) the tour package was a guided tour in Europe by local European guides and there was no need for a local Malaysian guide;

(l) the tribunal wrongly applied s 53 of the Consumer Protection Act 1999;

(m) the tribunal had wrongly decided that the tour package was priced too high and did not show the luxury and 5 star standard as promised;

[11] In support of the above, learned counsel cited *Holiday Villages of Malaysia Sdn Bhd v YB Menteri Sumber Manusia & Anor* [2009] 6 MLJ 402; [2010] 2 AMR 738 (CA); *R Rama Chandran v The Industrial Court of Malaysia* [1997] 1 MLJ 145 (FC); *Tenaga National Bhd v Tekali Prospecting Sdn Bhd & Anor* [2002] 2 MLJ 707; [2002] 3 CLJ 624 (CA); *Petrolium Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 (FC).

JUDICIAL REVIEW IN MALAYSIA

[12] Judicial review is a branch of law dealing with administrative law. In its traditional sense, it refers to the exercise of the court's supervisory powers over the decisions of inferior tribunals and statutory bodies. The decisions are tested against established principles developed over time by the common law (see recent decision of the Court of Appeal in *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507).

[13] The powers of the High Court of judicial review is enshrined under the Specific Relief Act 1950 and the Courts of Judicature Act 1964 ('CJA 1964'); in particular the additional powers which are set out in para 1 of the Schedule to s 25(2) of the CJA 1964. It empowers the High Court to issue to any person of authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Federal Constitution.

In fact, an application for judicial review may include a prayer for a declaration (O 53 r 2(2) of the ROC 2012). In the context of an application for judicial review of a decision of an inferior tribunal or statutory body, the court is usually called upon to make an order for mandamus, prohibition or certiorari. An order of certiorari has the effect of quashing a decision of a judicial or quasi-judicial authority with the intention of restraining any ultra vires exercise of powers. An order of mandamus is directed to private or municipal corporations, or to any of its officers, commanding the performance of a particular act or duty mandated by law (see s 44 of the Specific Relief Act 1950). An order of prohibition is directed only against a judicial or quasi-judicial authority in respect of proceedings before them.

PRINCIPLES OF JUDICIAL REVIEW

[14] At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction. (*Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor* [1998] 1 MLJ 305) The court will not interfere with the exercise of any power or discretion which has been conferred on an inferior court, administrative tribunal or other public authority. However, the decision of the body may be quashed by an order of certiorari where (a) that body has acted without jurisdiction; or (b) that body has exceeded its jurisdiction; or (c) body has failed to comply with the rules of natural justice in a case where the rules are applicable; or (d) there is an error of law on the face of the record or the decision is unreasonable in the *Wednesbury* sense. In short, whether certiorari will lie to quash the decision which has already been made by that body depends not on the decision itself but on whether the decision was made ultra vires, unfairly or unjustly in the exercise of the discretion. In dealing with this application for judicial review there are fundamental principles to be applied within regard the principles enunciated by the Court of Appeal in a case involving a judicial review of an award of the Industrial Court are instructive. In *Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam* [2006] 3 MLJ 493 (CA) at p 511 Mohd Ghazali JCA (later FCJ) said:

> From the authorities discussed above, I would think that *in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind*:
>
> (a) *judicial review is not an appeal from a decision but a review of the matter in which the decision was made;*
>
> (b) *the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;*

(c) *the High Court through judicial review, should not introduce technicalities of the court of law* to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of the case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;

(d) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal.

(e) *the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law*; and

(f) *the High Court will not interfere with findings of fact by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court*. (Emphasis added.)

[15] Against the backdrop of the Court of Appeal's decision in *Menara PanGlobal Sdn Bhd v Ariokianathan a/l Sivapiragasam*, in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 (FC) the Federal Court held that the distinction between review and appeal no longer holds. The principles to which a reviewing court should scrutinise included the following matters:

(a) the decision making process where the impugned decision is flawed on the ground of procedural impropriety;

(b) the merits where the decision is grounded on illegality or plain irrationality;

(c) the findings where the facts do not support the conclusion arrived at by a tribunal; or

(d) the findings where the findings of the tribunal had been arrived at by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration.

[16] Be that as it may, the power to review a decision on its merits is not absolute. In cases involving public policy, national interest, public safety or national security, it may be inappropriate to go into the merits or otherwise of a decision during a judicial review application (*Kumpulan Perangsang Selangor*

Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11 (FC); *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 (FC)).

[17] In the light of the above cited authorities, it is settled law that there are three principal grounds upon which a court may review a decision of an inferior tribunal or statutory body. They are:

(a) procedural impropriety;

(b) illegality; and

(c) irrationality.

Procedural Impropriety

[18] This is a classic case of review of the decision-making process. It addresses the decision-making process to test for procedural fairness with reference to the context and applicable statutory provisions. It includes the right to be heard, the rule against bias and the requirement of prior notice of the decision so that the person affected by the decision will be in a position to make representations and to adequately prepare and answer the case against him. There is also a duty of adequate disclosure. Whilst there must be a fair hearing, there is no general right of oral hearing. There is no general right to call witnesses or to cross-examine witnesses. There is also no general right to legal representation. Whilst there is also no general duty to give reasons, such failure to give reasons may give rise to the inference that there are no valid reasons for the decision. Further, there must be a real hearing. The decision maker cannot fetter its discretion by self-created rules of policy. The decision maker must be impartial and free from bias; the test for bias being absence of direct pecuniary interest (*B Surinder Singh Kanda v Government of Malaysia* [1962] MLJ 169; *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289; [1998] 3 CLJ 85 (CA); *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487; [1988] 2 CLJ Rep 390).

Illegality

[19] This involves a review of the decision-making process, not the merits. This is a typical ground for the control of discretionary power. Classic examples of illegality include 'error of law' and 'excess of jurisdiction', abuse of power and anisminic error. Under this head, the court will consider whether the public body in question had acted within the terms of power granted to it and within the bounds of the statutory purpose (*R Rama Chandran v Industrial Court* [1997] 1 MLJ 145; *Ranjit Kaur Gopal Singh v Hotel Excelsior* [2010] 6 MLJ 1;

[2010] 8 CLJ 1). Decisions tainted with illegality may arise if a decision maker makes a decision for an extraneous purpose or improper motive or takes into consideration irrelevant factors and or fails to take into consideration relevant factors. The court must also be satisfied that the decision is not actuated by mala fide. The decision-making process must also not violate the rule against delegation of discretionary power or the rule against deciding on no evidence or making findings of fact with no rational evidential basis; though as a rule there is non-interference with the assessment of evidence, particularly testimonial evidence (*Minister of Labour v Lie Seng Fatt* [1990] 2 MLJ 9; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2000] 2 AMR 2265).

[20] Lack of jurisdiction may arise in circumstances where a tribunal ask itself the wrong question; or take into account matters which it was not directed or required to take into account; or may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (*Anisminic Ltd v The Foreign Compensation Commission and Another* [1969] 1 All ER 208, 213–214).

Irrationality

[21] Under this ground, the issue is not whether the decision-maker strayed outside the purposes defined by the governing statute (illegality test), nor whether the decision was procedurally unfair (procedural propriety test). The question to be determined is whether the power under which the decision-maker acts, a power which normally confers a broad discretion has been improperly exercised. Therefore, a review under this ground extends beyond the process and to the substance or merits of the decision.

[22] A decision which falls on this ground is said to have failed the Wednesbury unreasonableness test (see *Associated Provincial Picture Houses Limited v Wednesbury Corpn* [1948] 1 KB 223). This is a decision that is said to be so outrageous in its defiance of logic that no sensible person who had applied his mind to it could have arrived at it. It also involves a consideration of the principle of proportionality *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261; *Kumpulan Perangsang Selangor v Zaid bin Hj Mohd Noh* [1997]1 MLJ 789; [1997] 2 CLJ 11). It may also include decisions taken in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight, in addition to strictly irrational decisions which are illogical or arbitrary (*R Rama Chandran*).

[23] The Federal Court adopted this principle in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ

135 (FC). In that case the registered owner of a piece of freehold land (title in perpetuity) applied to the Federal Government for subdivision of the land and for conversion of the express condition relating to the use of a hotel for which planning permission had been granted. The registered owner was informed that the application would be approved on condition that after surrendering the land, the registered owner would receive back a lease of 99 years instead of title to the land in perpetuity. The registered owner applied to court for an order that the approving authority approve its application for subdivision upon the usual terms and conditions. The High Court gave judgment for the registered owner. On appeal the Federal Court held that the approving authority had no power to make the registered owner/applicant give up its freehold title and receive in exchange a 99 year lease. The condition was set aside. The condition in question which the registered owner objected to did not relate to the permitted development, it was unreasonable and was used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which only leases not titles in perpetuity are granted. At p 146 Suffian LP reiterated the following principles:

> I am of the opinion that English cases afford principles that may be followed here. What are the principles? They are:
>
> (a) The approving authority does not have an uncontrolled discretion to impose whatever condition it likes.
>
> (b) The conditions, to be valid, must fairly and reasonably relate to the permitted development.
>
> (c) The approving authority must act reasonably and planning conditions must be reasonable.
>
> (d) The approving authority is not at liberty to use its power for an ulterior object, however, desirable that object may seem to it in the public interest.

In reconsidering these applications, the committee should act fairly and not arbitrarily. There must be no bad faith and no dishonesty, though in fairness to everybody concerned nobody has suggested that on the part of the committee. There must be no unreasonableness, no attention to extraneous circumstances, no disregard to public policy, and things of that sort — things mentioned by Lord Greene MR, at p 682 in *Associated Provincial Picture House v Wednesbury Corporation*.

At p 148, Raja Azlan Shah Ag CJ (Malaya) (as HRH then was) said:

> … On principle and authority, the discretionary power to impose such conditions 'as they think fit' is not an uncontrolled discretion to impose whatever conditions they like. In exercising their discretion, the planning authorities must, to paraphrase the words of Lord Greene MR in *Associated Provincial Picture House v Wednesbury Corporation* have regard to all relevant considerations and disregard all improper considerations, they must produce a result which does not offend against common sense: or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v Ministry of*

Housing and Local Government, approved in *Fawcett Properties Ltd v Buckingham County Council* the conditions to be valid must fairly and reasonably relate to the permitted development. The dictum of Lord Dening M.R. has been frequently quoted and followed in these matters. See *R v Hillingdon Council, Ex parte Royco Homes Limited*. Lord Denning said (p 572):

> The principles to be applied are not, I think in doubt. Although the planning authorities are given very wide powers to impose 'such conditions as they think fit'. Nevertheless the law says that those conditions, to be valid, must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.
>
> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonable. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place, (per Dankwerts LJ in *Bradbury v London Borough of Enfield.)*

[24] The law on the doctrine of ultra vires is quite settled. In *Penang Development Corporation v Teoh Eng Huat*, Edgar Joseph Jr J enunciated the law in relation to ultra vires. The following passage bears reproduction: At pp 754–755,

> I recognise that statutory corporations are subject to the doctrine of ultra vires. They are mere creatures of the statutes creating them, and the law will not suppose that they were created b any purpose other than those which induced the Legislature to act (see *Harts's Introduction to the Law of Local Government and Administration* (8th Ed at pp 292–293).
>
> The doctrine of ultra vires as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v River Dee Company* thuswise at p 362:
>
> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view of carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.
>
> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication.

If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament.

The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney General v Great Eastern Railway Co* at p 478:

It appears to me to be important that the doctrine of ultra vires … should be maintained. But I agree … that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of ultra vires. When the question arises whether a power if fairly incidental to those expressly given by the incorporating statute, thought it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the Legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v Riche*).

In *London County Council v Attorney General*, *Lord Halsbury LC referred to Ashbury Railway Carriage & Iron Co Ltd v Riche and Attorney General v Great Eastern Railway* and said: I think now it cannot be doubted that those two cases do constitute the law upon the subject.'

On the other hand, the tendency of the modern law is to show that the courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v Crayford Urban District Council* and *Bell Houses Limited v City Wall Properties Ltd*), thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal corporation, and so not ultra vires (see *A-G v Smethwick Corp*). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948 was not ultra vires (see *Grainger v Liverpool Corp*).

And at p 756:

It follows that in the application of the doctrine of ultra vires there are then three issues: first, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and thirdly, whether an act for which no such direct or

implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see *CA Cross Principles of Local Government Law* (4th Ed), pp 8–9).

Award of Tribunal under Consumer Protection Act 1999

[25] At the juncture, it is pertinent to note that the tribunal is a statutory body created under the Consumer Protection Act 1999 (CPA 1999). An award of the tribunal 'shall be final and binding on all parties to the proceedings' (s 116 of the CPA). This aspect of finality is reinforced by two provisions; (a) that an award shall be deemed to be an order of a magistrate's court and enforceable accordingly, and (b) criminal penalty of fine or imprisonment for non-compliance with an award (ss 116(2) and 117 of the CPA).

[26] Against this backdrop, it is becomes apparent that the intention of the Legislature in enacting the CPA is for the protection of consumers. The tribunal was created to give fair and speedy justice for the aggrieved consumer. The CPA provides a relatively fair and simple and expeditious procedure for the hearing of a claimant's claim. It is also pertinent to note that the award of the tribunal is final and binding.

[27] In the light of the legislative intent, it would not be appropriate for the court to go into the merits or substance of the tribunal's decision during this judicial review application. To do so would defeat the very object and purpose of the statutory framework of the CPA. Accordingly, the court will only exercise its corrective jurisdiction where there is clear evidence that the tribunal has failed to adhere to the acceptable standards of administrative law and justice, or administrative governance; as where it is shown that there has been a clear error of law committed by the tribunal (see *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] 4 MLJ 285; [2009] 2 ILR 489).

DECISION

[28] Of the 13 instances cited by the applicant, only one instance relates to an issue of illegality — that the tribunal wrongly applied s 53 of the CPA. The remaining 12 instances relate to findings of fact which had been made by the tribunal.

[29] A review of the respondent's statement of claim, the applicant's statement of defence and counterclaim, the notes of proceedings show that the tribunal had heard the oral and documentary evidence of the parties as well as considered the arguments of both parties. The tribunal's grounds of decision also show that the tribunal had made findings of fact based on the available

evidence. Having considered the facts in this case, there is no evidence to justify the court in reviewing the findings of fact by the tribunal. A

[30] For the reasons adverted to above, the court is not inclined to descend into the domain of an investigation into the merits or justification of the decision on the basis of facts and evidence found by the tribunal. If this court were to conduct such an investigation this court would be exercising its appellate powers and not its judicial review jurisdiction. B

[31] Returning to the issue of illegality, it is necessary to refer to s 53 of the CPA which reads as follows: C

> Implied guarantee as to reasonable care and skill
>
> 53 Where services are supplied to a consumer, there shall be implied a guarantee that the services will be carried out with reasonable care and skill. D

[32] Learned counsel for the applicant argued that s 53 of the CPA deals with services rendered or carried out which were not relevant to the tour package rendered by the applicant to the respondent. No authority was cited in support of his proposition. E

[33] On the facts, the applicant had contracted to provide travel and tour arrangements for the respondent's tour to Switzerland and Italy. The applicant had undertaken to make all the necessary arrangements relating to transport (air and land), accommodation, food and local tours amongst others. The obligations described are in the nature of services; which is clearly envisaged in the CPA. In the premises the court is satisfied that the services provided by the applicant fall within the meaning and scope of s 53 of the CPA. F G

[34] Whilst the tribunal had made reference to s 53 of the CPA, (at p 6 of the grounds of decision) the Tribunal had also made a finding of fact based on the evidence that the services provided by the applicant had fallen far short of that standard expected and that the costs charged by the applicant were too excessive. H

[35] In all the circumstances, the contention that the tribunal had wrongly applied s 53 of the CPA is without merit and unsubstantiated. I

[36] For the foregoing reasons, the court is not satisfied that the tribunal has transgressed any of the principles of good administrative governance. The application was therefore dismissed with costs.

Application dismissed with costs.

Reported by Afiq Mohamad Noor